2012

The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Thomas C. Horne; Bruce r. Wisan; Mark Shurtleff; and Hon. Denise Posse Lindberg; et al. : Opposition Brief of Appellants

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
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IN THE SUPREME COURT OF THE STATE OF UTAH

The Fundamentalist Church of Jesus Christ of Latter-Day Saints, Plaintiffs and Appellee v. Thomas C. Horne; Bruce R. Wisan; Mark Shurtleff; and Hon. Denise Posse Lindberg; et al., Defendants and Appellants	)	CASE No. 20120158-SC

On Certification from the United States Court of Appeals for the Tenth Circuit
Case Nos. 11-4049, 11-4050, 11-4053, 11-4059,
11-4066, 11-4071, 11-4072 & 11-4076

OPPOSITION BRIEF OF APPELLANTS' SPECIAL FIDUCIARY WISAN AND HONORABLE DENISE POSSE LINDBERG

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INTRODUCTION

This Court should answer the Tenth Circuit's certified question by holding that under Utah law, dismissal of a petition for an extraordinary writ on grounds of laches in a written opinion is a decision "on the merits" such that later adjudication of the same claim is barred. "[W]hen a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent action for the same cause and between the same parties." *Gates v. Taylor*, 2000 UT 33, ¶3, 997 P.2d 903 (per curiam) (quotations omitted). This is true regardless of whether the court directly adjudicates the plaintiff's substantive claims or "says to the plaintiff 'you are too late.'" *Am. Nat'l Bank & Trust Co. v. City of Chi.*, 826 F.2d 1547, 1553 (7th Cir. 1987). In either case, the decision "may be 'on the merits' for purposes of preclusion." *Id.*

The FLDS Association urges the Court to disregard this precedent and hold that if a Utah court issues a written opinion dismissing a petition for extraordinary writ on grounds of laches, the preclusive effect depends on a number of "circumstances," including whether the "laches determination is based on actual litigation of the underlying facts" in a "fact-finding court," and whether a "true and thorough laches analysis was applied." FLDS Br. 3-4. As explained below, these "circumstances" find no support in the case law or logic.

Rather, it appears that the FLDS Association's multi-factor analysis is designed to obscure the fact that in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, ¶1, 238 P.3d 1054, this Court expressly held that the FLDS Association's constitutional claims were barred by laches: "We hold that because the FLDS Association has delayed this challenge for nearly three years, and because during this time, many parties have engaged in numerous transactions in reliance on the Trust's modification, the FLDS Association's trust modification claims are barred by the equitable doctrine of laches." That this Court *could* have dismissed the petition on purely discretionary grounds, or, in the Association's view, *should not* have found laches on the record here, is irrelevant to the preclusive effect of the decision. What is relevant is that this Court, after thorough consideration of the record and the Utah law of laches, *actually did* hold the FLDS Association's claims barred by laches. Nothing in the Court's laches analysis depended on the fact that the issue arose in the context of a petition for extraordinary writ. This Court cited the same case law, analyzed the same factors, and based its holding on the same considerations it would use if a question of laches arose in any other type of proceeding. Under these "circumstances," this Court's finding of laches in *Lindberg* should not be subject to relitigation in federal court simply because it was issued in the context of an extraordinary writ proceeding.

Indeed, the FLDS Association has failed to provide any logical reason why it—or any other plaintiff whose writ action has been dismissed on laches grounds—should be permitted to litigate its claim in successive actions. Laches and res judicata are both intended to promote repose and protect reliance interests.[1] Allowing a tardy plaintiff to relitigate a claim that was barred by laches in an earlier writ action undermines these important public policies. Likewise, adopting the FLDS Association's proposed "general rule" limiting the preclusive effect of decisions made in the context of original actions would have far-ranging and negative consequences. It would effectively render a written decision by this Court denying a petition for extraordinary writ to be little more than an advisory opinion.

ARGUMENT

The FLDS Association's brief starts from the premise that this Court lacks "jurisdiction" to resolve the "preclusive effect" of *Fundamentalist Church of Jesus*

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[1] *Compare, e.g., Mackall v. Casilear*, 137 U.S. 556, 566 (1890) ("The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands."), *with Nevada v. United States*, 463 U.S. 110, 129 (1983) (res judicata "ensures 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if ... conclusiveness did not attend the judgments of such tribunals.'") (omission in original); *see also Rotella v. Wood*, 528 U.S. 549, 555 (2000) (stating that "the basic policies of all limitations provisions" is to provide "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's ... liabilit[y].").

Christ of Latter-Day Saints v. Lindberg, 2010 UT 51, 238 P.3d 1054, and thus can only opine on "abstract" questions of law. FLDS Br. 4-7. Indeed, the FLDS Association goes as far as saying this Court cannot even "discuss *Lindberg* at all." *Id.* at 7.

The FLDS Association does not seriously dispute that a prior decision dismissing a claim on laches grounds can be preclusive and that decisions by this Court in the context of a Rule 65B petition can be preclusive. *Id.* at 3-4, 14-15. The Association, however, contends the preclusive effect of the denial of a Rule 65B petition depends on the "express terms" of the opinion and a number of "circumstances" that just happen to be present in this case and might be viewed as giving the Association grounds to return to the Tenth Circuit and argue that *Lindberg* does not bar its federal action against Judge Lindberg and the Fiduciary. *Id.* at 2-4, 7-25. That results-oriented proposal should be rejected. As discussed below, the FLDS Association misapprehends the scope of this Court's jurisdiction, and there is no justification for adopting its multi-factored res judicata test, regardless of whether the various factors are viewed in the abstract or as applied to the facts of this case.

1. Notwithstanding the FLDS Association's assertion to the contrary, *id.* at 7, this Court may answer the certified question with reference to the *Lindberg* decision. The Utah Supreme Court has "original jurisdiction to answer questions

of state law certified by a court of the United States." Utah Code Ann. §78A-3-102(1). To ensure that the Court has the information necessary to answer certified questions, Utah Rule of Appellate Procedure 41(c)(2) requires the certifying court to "set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed." Those requirements are met here.

The question of the preclusive effect of *Lindberg* is undoubtedly a question of Utah law. Indeed, the FLDS Association conceded this point in the federal district court and agreed that if *Lindberg* "is considered to be on the merits for res judicata purposes" under Utah law, the federal courts are "bound by the Utah Supreme Court's finding of laches and must dismiss the case." Aplt.App.56. Likewise, the Tenth Circuit's certification order specifically discusses *Lindberg* and explains how that decision led the court to certify the question of the preclusive effect of a Utah court's denial of a petition for extraordinary writ on grounds of laches. *See* Order Certifying State Law Questions at 8-11, Doc. No. 01018803969 (10th Cir. Mar. 2, 2012). There is, therefore, no jurisdictional bar or procedural rule preventing this Court from answering the certified question with reference to *Lindberg* or the particular facts of this case. *Cf. Shoemaker v. City of Bremerton*, 745 P.2d 858, 859 (Wash. 1987) (deciding, on certification from the

Ninth Circuit, whether "Washington law afford[s] preclusive effect to the factual findings of the Bremerton Civil Service Commission that Joe Shoemaker's reductions in rank were not retaliatory").

Nor is there any prudential reason for this Court to answer the certified question at an abstract level of generality that could result in additional disputes about the scope of Utah law on this issue. It does not "promot[e] efficiency, or otherwise serv[e] the objectives of the question certification process," for this Court to return "an answer to the federal court which all concerned know" will spawn "additional state law questions." *Miller v. United States*, 2004 UT 96, ¶8, 104 P.3d 1202.

> The question certification procedure represents a unique exercise of [this Court's] original jurisdiction. Unlike . . . traditional appellate review, [the Court is] not presented with a decision to affirm or reverse. Instead, [it is] being approached for guidance. [The Court] should respond to these requests guided by a desire to provide meaningful and comprehensive assistance which, under certain circumstances, may require a more expansive answer than a literal reading of the certified question may warrant.

Id. ¶10.

The need for guidance is particularly acute here because there are several cases pending in state and federal courts that raise a similar question about the preclusive effect of *Lindberg*.[2] Litigation challenging the constitutionality of the

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[2] *See, e.g.*, *Wisan v. City of Hildale*, Utah Supreme Court Case No. 20100993 (filed Dec. 12, 2012) (challenging the Special Fiduciary's authority to subdivide

reformation of the UEP Trust has been costly and time-consuming for all concerned. A decision about the preclusive effect of *Lindberg* itself would promote efficiency and enhance the ability of Utah courts to make final determinations about the control and disposition of the Trust's assets.

2. The FLDS Association's primary argument is that, as a "[g]eneral [r]ule," "[d]enials of extraordinary writs do not preclude subsequent litigation of the underlying substantive claims." FLDS Br. 7. That argument, however, is inconsistent with this Court's holding in *Gates v. Taylor*, 2000 UT 33, ¶¶1-2, 997 P.2d 903, that where a petition for extraordinary writ is denied in a written opinion that "is clear that the matter was decided on the merits," the "petitioners are barred by the doctrine of res judicata from seeking the same relief" from another court.

Trust land); *In re United Effort Plan Trust*, Utah Supreme Court Case No. 20090691 (filed Aug. 27, 2009) (challenging Judge Lindberg's denial of motions by FLDS members to intervene in the probate proceedings to challenge the impact of the Trust reformation and administration); *Colorado City v. United Effort Plan Trust*, No. 3:11-cv-08037-DGC (D. Ariz., filed Mar. 11, 2011) (Colorado City seeking a declaration that the reformation of the Trust was unconstitutional and therefore the Special Fiduciary has no authority to administer Trust land in Colorado City and the City has no obligation to deal with him or residents of Trust land occupying homes pursuant to an occupancy agreement negotiated with the Special Fiduciary); *Cooke et al v. Colorado City, et al.*, No. 3:10-cv-08105-JAT (D. Ariz., filed June 24, 2010) (Colorado City defending lawsuit by the State of Arizona and Ron and Jinjer Cooke for the refusal of Colorado City to provide water to the Cookes on the ground that the Trust reformation was unconstitutional and the Special Fiduciary had no authority to enter into the occupancy agreement at issue); *Jessop v. Wisan*, S-8015-cv-20082047 Sup. Ct. Mohave Cnty. Ariz. (filed Nov. 7, 2008) (FLDS members challenging the sale of Trust property on the grounds that the reformation of the Trust is unconstitutional).

The FLDS Association apparently recognizes this point, because elsewhere in its brief it asserts (without any discussion or reasoning) that *Gates* is limited to its facts—namely, to cases in which the petitioner files a successive Rule 65B petition. *See* FLDS Br. 3-4.

Gates cannot be read so narrowly. Using reasoning that contradicts the FLDS Association's cramped reading, this Court emphasized that "[s]ound policy, principles of judicial economy, and fairness to the parties require that final judgments on the merits be subject only to proper appellate review *and not to successive relitigation in new courts*." *Gates*, 2000 UT 33, ¶3, 997 P.2d 903 (emphasis added). This Court went on to hold that "[w]hen a court of competent jurisdiction has adjudicated directly upon a particular matter, *the same point is not open to inquiry in a subsequent action for the same cause and between the same parties*." *Id.* (emphasis added) (quotations omitted).[3] Thus nothing in *Gates*—or logic—supports the FLDS Association's assertion that the dismissal of a writ on the merits bars relitigation of the claim or issue only in a successive Rule 65B petition, but not in a different type of action.

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[3] The FLDS Association's observation (at 13) that the Utah Constitution no longer requires this Court to issue a written opinion when it enters judgment on the merits *supports* our position here. By issuing a thorough, written opinion in a context where it was under no obligation to do so, this Court clearly demonstrated that it had "adjudicated directly upon a particular matter" such that "the same point is not open to inquiry in a subsequent action for the same cause and between the same parties." *Gates*, 2000 UT 33, ¶3, 997 P.2d 903.

The FLDS Association also suggests that its position is consistent with the majority rule in other courts, but the treatise that it cites (at 10) establishes the very opposite point.

> Disposition of requests for relief by injunction or extraordinary writ poses few distinctive preclusion problems. All that is required is careful attention to the nature of the initial proceeding and the basis of decision.

18A Wright, Miller, et al., *Federal Practice and Procedure* (2d ed. 2002), §4445; *see also* E. T. Tsai, Annotation, *Judgment Granting or Denying Writ of Mandamus or Prohibition as Res Judicata*, 21 A.L.R. 3d 206 §2 (it is "well settled that the doctrine of res judicata is applicable to judgments in mandamus and prohibition proceedings") (footnotes omitted). As our opening brief explains, numerous courts have given preclusive effect to decisions made in the context of extraordinary writ actions, where, like here, there is a written opinion showing that the Court "adjudicated directly" a disputed claim or issue. Wisan-Lindberg Br. 36-37 (citing cases).

3. The FLDS Association does not seriously dispute that courts have given preclusive effect to decisions holding a claim barred by laches (or, relatedly, by an applicable statute of limitations, failure to prosecute or undue delay). Instead, the FLDS Association contends that a laches determination made by an "appellate" court (rather than a "trial" court) cannot be given res judicata effect. FLDS Br. 11-12. According to the FLDS Association, laches is "a question of fact" and an

appellate court cannot make the necessary factual findings. *Id.* This contention is unavailing.

a. When this Court or the Utah Court of Appeals rules on a Rule 65B petition for an extraordinary writ, it exercises its *original* jurisdiction. *See Gates*, 2000 UT 33, ¶3, 992 P.2d 903. In such cases, the Court may consider the evidence presented by the parties in support of the petition and opposition, as well as the record of the judicial proceeding for which the writ is sought, and make the factual findings necessary for its decision. *See, e.g., Anderson v. Taylor*, 2006 UT 79, ¶¶2-7, 149 P.3d 352 (making factual findings about a district court's general practice concerning preservation of affidavits used to obtain search warrants and the steps it took to preserve the affidavit in Anderson's particular case). Indeed, in holding that there is no statute of limitations for Rule 65B petitions, but that a petition may be dismissed on grounds of laches, *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 684 (Utah 1995), this Court necessarily determined that appellate courts can make the factual determinations necessary to determine whether the laches criteria are met. There is, therefore, no basis for the FLDS Association's assertion that this Court's dismissal of a petition for extraordinary writ on grounds of laches has no preclusive effect because the "facts underlying the laches defense were not litigated." FLDS Br. 3, 12.

b. To the extent the FLDS Association implies that it did not have the opportunity to contest disputed factual issue relevant to this Court's laches finding, FLDS Br. 12, such an assertion is patently incorrect. The FLDS Association chose to file the Rule 65B action and to stay its federal district court action pending this Court's resolution of that petition. If the FLDS Association had thought there were disputed issues of material fact that could not properly be resolved in an original action, it should not have brought the petition or, at a minimum, should have made that argument in the writ action and sought rehearing of this Court's decision. The FLDS Association cannot avoid the consequences of its prior litigation strategy by resorting to "successive litigation in new courts." *Gates*, 2000 UT 33, ¶3, 997 P.2d 903; *see also, e.g.*, *Collins v. Sandy City Bd. of Adjustments*, 2002 UT 77, ¶20, 52 P.3d 1267 (litigants who fail to appeal adverse judgments "are bound by the judgment and may not relitigate an issue they already had an opportunity to litigate").[4]

In any event, the FLDS Association does not assert that it was unable to offer relevant evidence to support its petition for extraordinary writ. Nor has it identified any disputed issue of material fact that this Court improperly resolved. This Court had the benefit of the record of the underlying probate proceedings, *cf.*

[4] Likewise incorrect is the FLDS Association alternative suggestion that as an original action this Court's decision in *Lindberg* did not make any factual findings. *Compare* FLDS Br. 12, *with* 2010 UT 51, ¶¶30-35, 238 P.3d 1054.

FLDS Br. 12, and the FLDS Association does not—and cannot—dispute that its members were on notice of the reformation of the Trust by Judge Lindberg yet waited nearly three years before seeking to challenge the decision. *See Lindberg*, 2010 UT 51, ¶30, 238 P.3d 1054. Indeed, counsel for the FLDS Association effectively conceded that point to this Court. Aplt.App.4119, 4127-4129. Likewise, the FLDS Association does not dispute that third-parties, such as the original Tort Plaintiffs, relied on the reformation of the Trust and that no party appealed that decision. *See Lindberg*, 2010 UT 51, ¶¶33-34, 238 P.3d 1054. The FLDS Association simply disagrees with this Court's legal conclusion that these facts demonstrate laches.

This is confirmed by the FLDS Association's reliance on the federal district court's critique of the *Lindberg* decision. FLDS Br. 18-20. The federal district court *held no evidentiary hearing before rejecting this Court's findings that laches should apply in these circumstances*. *See* Aplt.App.1-21. Further, the federal district court did not dispute any of this Court's core factual findings that the FLDS Association had notice of the Trust reformation and that third parties reasonably relied on that reformation when it was not appealed. Rather, the federal district court found that such facts were insufficient to establish laches because of the potential "merits" of the FLDS Association's constitutional claims and because the "tort lawsuit settlements certainly can be dealt with by the same legal system one

would expect to be able to allow these plaintiffs to somewhere obtain a ruling on the merits of their constitutional claims." Aplt.App.55, 61-42. That the FLDS Association and the district court disagree with *Lindberg* is not a sufficient reason for denying it preclusive effect.

4. In another variation on the same theme, the FLDS Association asserts that courts have adopted "the general rule that laches dismissals lack preclusive effect unless they fully litigate the merits." FLDS Br. 15; *see also id.* at 4 (dismissal on laches ground should be considered to have preclusive effect only if the second court concludes, after "careful[] analy[sis]," that the original decision undertook a "true and thorough laches analysis," including the merits of plaintiff's underlying claim). Again, no such "general rule" exists.

a. It is well-established that a judgment based on an affirmative defense may be "on the merits" for purposes of res judicata even though it did not consider the "merits" of plaintiff's substantive claims. As we demonstrated in our opening brief (at 27-28), although a judgment must be "'on the merits'" to bar subsequent litigation of the same claim between the same parties, it is a "misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation." *Angel v. Bullington,* 330 U.S. 183, 190 (1947). Rather, "[a]n adjudication declining to reach such ultimate substantive issues may bar a second

attempt to reach them in another court of the State," because the "'merits' of a claim are disposed of when [they are] refused enforcement." *Id.*

Thus, courts have routinely applied res judicata to prior decisions finding a claim barred by statute of limitations or laches without "carefully analyz[ing]" whether the original court engaged in a "true and thorough" analysis of the "merits" of the plaintiff's substantive claims. *See, e.g.*, *Smith v. City of Chi.*, 820 F.2d 916, 918-19 (7th Cir. 1987); *Am. Nat'l Bank & Trust*, 826 F.2d at 1553; *Cannon v. Loyola Univ. of Chi.*, 784 F.2d 777, 781 (7th Cir. 1986); *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (Breyer, J.); *State v. Cahoon*, 2009 UT 9, ¶14, 203 P.3d 957. If a court says to the plaintiff "'you are too late' or otherwise wraps up a case in a way that indicates that the plaintiff has irrevocably failed," the decision "may be 'on the merits' for purposes of preclusion even though the court did not resolve the merits" of the plaintiff's underlying claim. *Am. Nat'l Bank & Trust*, 826 F.2d at 1553; *see also Cahoon*, 2009 UT 9, ¶14, 203 P.3d 957 (res judicata can bar relitigation of a claim dismissed on statute of limitations grounds).

Notably, the FLDS Association does not explain why its proposed rule would make sense, and, as we explained in our opening brief, it does not. Wisan-Lindberg Br. 27-33. If courts were to relax principles of res judicata whenever they thought a litigant had a strong claim on the merits, the doctrine "would fail to serve its purposes of promoting judicial economy and repose." *Rose*, 778 F.2d at

82; *see also Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981) (relitigation of the correctness of the original decision "undermine[s] . . . the very purpose of the doctrine of *res judicata*"). A defendant with a valid affirmative defense should not be forced to incur the unnecessary and inappropriate costs of litigating the substantive merits of the underlying claims in another lawsuit.

Indeed, it would make no sense to weigh the "merits" of a plaintiff's claim in assessing the preclusive effect of a dismissal based on an affirmative defense that applies regardless of the potential merits of the claim. *See infra* n.5. For example, it would be completely illogical to ask whether the original court gave sufficient attention to the "merits" of claims held barred by the statute of limitations. The FLDS Association offers no explanation why a different rule should apply to the related concept of laches, which serves an analogous function to statutes of limitations in the context of petitions for an extraordinary writ. *Renn*, 904 P.2d at 684. And, unsurprisingly, as we previously demonstrated, the two cases cited by the FLDS Association for its supposed "general rule" do not announce a different standard. Wisan-Lindberg Br. 33 & n.8.

b. The FLDS Association's theory seems to rest on the notion that a Utah court must consider and weigh the "merits" of a plaintiff's underlying claim in determining whether laches applies. FLDS Br. 4, 15. But even if this Court's precedents prohibited a dismissal on laches grounds unless the merits of the

plaintiff's substantive claims were discussed in the opinion—and it does not appear to impose any such requirement[5]—whether a decision dismissing a claim on laches grounds correctly analyzed the merits of the plaintiff's claim is legally irrelevant to whether the decision has preclusive effect.[6] The "res judicata consequences" of a final judgment are not "altered by the fact that the judgment may have been wrong . . . ." *Federated Dep't Stores*, 452 U.S. at 398; *see also, e.g.*, *Collins*, 2002 UT 77, ¶18, 52 P.3d 1267 (same). To the extent that the original court made a legal error (here, in the FLDS Association's view, the putative failure of this Court in *Lindberg* to give proper weight to the "merits" of the Association's constitutional claims, FLDS Br. 4), the remedy is to raise that argument to the original court or on review, not to relitigate the issue or claim in another court. *Federated Dep't Stores*, 452 U.S. at 398-401; *Collins*, 2002 UT 77, ¶19, 52 P.3d 1267. The

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[5] As *Lindberg* itself determined, "laches has two elements: (1) a party's lack of diligence and (2) an injury resulting from that lack of diligence." *Lindberg*, 2010 UT 51, ¶27, 238 P.3d 1054; *see also Angelos v. First Interstate Bank of Utah*, 671 P.2d 772, 777 (Utah 1983) ("'To constitute laches, two elements must be established: (1) The lack of diligence on the part of plaintiff; [and] (2) An injury to defendant owing to such lack of diligence.'") (alteration in original) (quoting *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1260 (Utah 1975)). Laches is an equitable doctrine developed to discourage stale claims and protect reliance interests even where a plaintiff's claims may be potentially meritorious. *See supra* p. 3.

[6] Notably, although *Lindberg* did not specifically discuss the relative strength of the FLDS Association's constitutional claims, its laches analysis appeared to assume *arguendo* those claims were potentially meritorious. *See* 2010 UT 51, ¶26, 238 P.3d 1054.

Association's contrary rule would "upset the general and well established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy." *Collins*, 2002 UT 77, ¶19, 52 P.3d 1267 (quotations omitted).

5. Finally, the FLDS cannot avoid the preclusive effect of *Lindberg* by contending that the reformation of the Trust violated "structural" prohibitions of the Establishment Clause and that such violations can never be barred by laches. FLDS Br. 21-25. This argument is first and foremost an impermissible attempt to avoid the preclusive effect of a prior decision by arguing that it is incorrect. As previously noted, *see supra* p. 16, "'an erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of the right to rely upon the plea of res judicata.'" *Collins*, 2002 UT 77, ¶18, 52 P.3d 1267 (quoting *Federated Dep't Stores*, 452 U.S. at 398).

In addition, this argument was necessarily rejected by the Tenth Circuit when it certified the state law question to this Court. Before the Tenth Circuit, the FLDS Association defended the preliminary injunction issued by the federal district court by arguing that its Establishment Clause claims could not be barred by laches (or otherwise waived). *See* Brief of FLDS at 16, Doc. No. 01018736073 (10th Cir. Oct. 27, 2011). Nevertheless, the Tenth Circuit certified to this Court

the question of the preclusive effect of the dismissal of a petition for extraordinary writ on grounds of laches. Because certification is proper only if a question of Utah law is "a controlling issue of law in a proceeding pending before the certifying court," Utah R. App. P. 41(c)(1)(B), the Tenth Circuit could not have certified the question of the preclusive effect of a dismissal on the grounds of laches if, as the FLDS Association now argues, laches cannot bar Establishment Clause claims. *See* Order Certifying State Law Questions at 8, 14-15, Doc. No. 1018803969 (issuing the certification order pursuant to Utah Rule of Appellate Procedure 41); *see also id.* at 8 ("The resolution of this question of Utah law will likely control the outcome in appeals pending before our court.").

In all events, the FLDS Association is wrong that the reformation of the Trust violated the Establishment Clause and that claims alleging Establishment Clause violations cannot be barred if untimely.

a. It is well established that constitutional challenges are barred if untimely. *See, e.g.*, *Smith v. City of Enid*, 149 F.3d 1151 (10th Cir. 1998) (constitutional claims barred by statute of limitations); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336 (2d Cir. 1991) (Establishment Claim barred by laches); *Perry v. Judd*, 2012 WL 113865, at *6-7 (E.D. Va. Jan. 13, 2012), *aff'd*, 2012 WL 120076 (4th Cir. Jan. 17, 2012) (First and Fourteenth Amendment claims barred by laches). The FLDS Association cannot avoid this result by asserting that an

Establishment Clause violation "cannot be cured by the passage of time." FLDS Br. 22. In *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003), plaintiffs attempted to bring untimely taking claims by similarly arguing that "if Congress lacks the constitutional power to take private property without paying for it, how can it suddenly get the power after six years or any other designated period of elapsed time?" The Federal Circuit rejected the argument for reasons that are equally applicable here: American law has long recognized that "a plaintiff cannot sleep on his or her rights, and then suddenly demand a remedy, without creating a greater wrong against the party charged, and a wrong against the peace of the community." *Id.* at 1256. Indeed, the Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292 (1983) (citations omitted).

b. The FLDS Association's argument also assumes that it has stated a viable Establishment Clause violation. It has not. The First Amendment does not require the probate court to ignore the *cy pres* doctrine, Utah Code Ann. §75-7-413, or to sanction, in contravention of Utah law, *id.* §75-7-106, the inequitable result of allowing "the President of the FLDS Church, who violated his fiduciary duties to thousands of potential Trust beneficiaries, to benefit (directly or indirectly) from assets consecrated by those individuals as part of their personal quest for

sanctification," Aplt.App.1590 n.86. To the contrary, a State is "constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." *Jones v. Wolf*, 443 U.S. 595, 604 (1979). As was done here, such "neutral-principles approach" permits a court to resolve a church property dispute through the application of "well-established concepts of trust and property law." *Id.* at 603; *see also Synanon Found., Inc. v. California*, 444 U.S. 1307, 1307-08 (1979) (Rehnquist, J.) (stay denial).

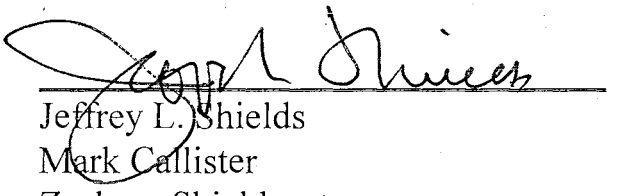
Indeed, more than a century ago the Supreme Court upheld Congress's legislative use of the *cy pres* doctrine to seize property of a church that engaged in unlawful acts and to use the property for secular charitable purposes chosen by the government. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48-52 (1890). The seizure of church property in that case, the Court later explained, was "bottomed on the general rule that where a charitable corporation is dissolved for unlawful practices, the sovereign takes and distributes the property according to the *cy-pres* doctrine to objects of charity." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 120 (1952) (citations omitted). "A failure of the charitable purpose could have the same effect." *Id.* Thus, the probate court's application of the *cy pres* doctrine to modify the Trust to further only its legitimate charitable purpose and not illegal acts was consistent with Supreme Court precedent and "cannot be said to 'inhibit'

the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods." *Jones*, 443 U.S. at 606.

CONCLUSION

This Court should hold that under Utah law, dismissal of a petition for an extraordinary writ on grounds of laches in a written opinion is a decision "on the merits" such that later adjudication of the same claim is barred. Accordingly, this Court should further confirm that its decision in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, 238 P.3d 1054, was on the merits and that no party or privity of any party can relitigate any claim that was or could have been raised in that matter.

Respectfully submitted,



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Dated: May 21st, 2012

Jeffrey L. Shields

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I hereby certify that on this 21st day of May 2012, I caused two (2) true and correct copies of the foregoing **OPPOSITION BRIEF OF APPELLANTS BRUCE R. WISAN AND DENISE POSSE LINDBERG** to be filed and served via U.S. first-class, postage fully pre-paid, mail upon the following:

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